9-20-2011

State v. Gwin Appellant's Brief Dckt. 38636

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38636
	)	
v.	)	
	)	
ROY THOMPSON GWIN,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

HONORABLE JOHN K. BUTLER
District Judge

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

SARA B. THOMAS
Chief, Appellate Unit
I.S.B. # 5867

ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender
I.S.B. # 7259
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Roy T. Gwin appeals from the Judgment of Conviction Upon a Conditional Plea of Guilty to One Felony Count. After the district court denied his motion to suppress, Mr. Gwin entered a conditional plea of guilty to the charge of felony driving under the influence and a persistent violator enhancement. Mr. Gwin asserts that the district court erred in denying his motion to suppress evidence because his right to be free from unreasonable seizures, protected by the Fourth and Fourteenth Amendments to the United States Constitution and Article I § 17 of the Idaho Constitution, was violated when law enforcement officers improperly seized him without reasonable suspicion, and as such, the evidence derived from the improper seizure must be suppressed.

Additionally, Mr. Gwin asserts that the district court abused its discretion when it sentenced him to a unified sentence of twenty years, with three years fixed, without properly considering the mitigating factors that exist in this case.

Statement of the Facts and Course of Proceedings

On September 14, 2010, an Information was filed charging Mr. Gwin with felony driving under the influence. (R., pp.69-72.) Mr. Gwin was also charged with a persistent violator enhancement. (R., pp.73-74.)

In November, Mr. Gwin filed a Motion to Suppress requesting that the district court suppress "all evidence in this criminal action which was the direct or indirect product or otherwise the fruit of the warrantless and illegal stop, arrest, search and seizure of the Defendant and/or his vehicle occurring on or about August 9, 2010." (R., pp.95-96.) The motion was "based upon the grounds that the Defendant and/or his

vehicle was stopped without sufficient probable cause and/or reasonable articulable suspicion or other legal justification." (R., pp.95-96.) The district court held a hearing on the motion. (R., pp.103-105.)

Defense counsel called Deputy Christian McRoberts. (Tr., p.5, Ls.2-14.) Deputy McRoberts testified that he was on duty the evening of the instant offense and that he responded to a call from SIRCOMM that there was a report of a fight in the street. (Tr., p.6, L.1 – p.8, L.8.) When he arrived at the location he saw a person, later identified as David Gwin, walking in the middle of the street. (Tr., p.8, L.9 – p.9, L.14.) David Gwin told the officer that he had been in an argument with his father Roy, that he did not want to press any charges, and that his father was driving a green Blazer. (Tr., p.9, L.19 – p.13, L.10.) David did not appear to have any injuries, but did have a ripped shirt. (Tr., p.11, Ls.1-25.) Deputy McRoberts radioed Deputy Summers and told him that they were looking for a green Blazer. (Tr., p.14, Ls.4-19.)

The next witness was Deputy Summers. (Tr., p.19, Ls.7-21.) Deputy Summers was also on duty the evening of the arrest. (Tr., p.20, Ls.1-18.) After receiving a radio call from Deputy McRoberts, Deputy Summers located a green Blazer and conducted a traffic stop. (Tr., p.21, L.11 – p.24, L.13.) The reason the Blazer was stopped was because of Deputy McRoberts' radio call and in further investigation of the report of a fight. (Tr., p.25, Ls.2-21, p.27, L.4 – p.28, L.8.)

Defense counsel argued that any suspicion was dispelled once officers contacted David Gwin, David told them he didn't want to press charges, and did not appear to have any injuries. (Tr., p.32, Ls.7-18.) Counsel also argued that there was no information that Roy Gwin was in need of assistance, wanted to pursue charges, or that a battery had even occurred. (Tr., p.35, Ls.11-19.) The State argued that this was just

good police work and that the officers need to check with both parties because they knew there was a fight. (Tr., p.36, L.13 – p.37, L.24.)

The district court later denied the suppression motion. (R., pp.112-119.) Specifically, the district court found that:

> The deputies new [sic] at the time that the traffic stop was made that the defendant and his son had been in a fight. The altercation resulted in a citizen's call to dispatch. The defendant had left his son stranded in the early morning hours. The deputies had only one version of the altercation. The defendant's vehicle was spotted in the area of the altercation and the traffic stop was in the vicinity of the altercation. This court is persuaded that given the totality of the circumstances, Deputy Summers had a reasonable and articulable suspicion that the driver of the stopped vehicle was the same as the individual in the altercation, a possible crime. Given the nature of the altercation, an officer could have thought that the crimes of battery or assault could have been committed. This court is not convinced that just because David Gwin did not appear to be physically injured and did not wish to press charges that no crime may have been committed and further investigation was unwarranted. This court finds that it is reasonable to stop a green, Chevrolet Blazer; near the scene of the altercation, at 2:00 a.m. on a Monday, when few cars are likely to be on the road, let alone matching the description; based on the totality of the circumstances. This combination of circumstances allowed for a reasonable and articulable suspicion justifying the vehicle stop to further investigate the report of the altercation between the defendant and his son.

(R., pp.118-119.)

Following the denial of the suppression motion, Mr. Gwin entered conditional guilty pleas to the felony driving under the influence charge and the persistent violator enhancement. (R., pp.141-144.) Mr. Gwin specifically preserved the right to challenge the denial of the suppression motion. (R., pp.143-144.) The district court imposed a unified sentence of twenty years, with three years fixed. (R., pp.151-156.) Mr. Gwin filed a Notice of Appeal timely from the Judgment of Conviction Upon a Conditional Plea of Guilty to One Felony Count. (R., pp.158-160.)

ISSUES

1. Did the district court err when it denied Mr. Gwin's motion to suppress?

2. Did the district court abuse its discretion when it imposed a unified sentence of twenty years, with three years fixed, upon Mr. Gwin following his plea of guilty to felony driving under the influence and a persistent violator enhancement?

ARGUMENT

I.

The District Court Erred When It Denied Mr. Gwin's Motion To Suppress

A. Introduction

Mr. Gwin's right to be free from unreasonable seizures was violated when officers illegally seized him. The State failed to meet its burden of proof, failing to show that the officer had reasonable suspicion to detain Mr. Gwin. The officer could not seize Mr. Gwin without reasonable suspicion and, as such, the district court's order denying Mr. Gwin's motion to suppress should be reversed.

B. Standard Of Review

The review of a suppression motion is bifurcated. *State v. Lafferty*, 139 Idaho 336, 338 (Ct. App. 2003). When a decision on a motion to suppress is challenged, the trial court's findings of fact that are supported by substantial evidence are accepted; however, the application of constitutional principles to the facts as found are freely reviewed. *State v. McCall*, 135 Idaho 885, 886 (2001). At a suppression hearing, the power to assess the credibility of all witnesses, weigh evidence, resolve factual conflicts and draw factual inferences is vested in the trial court. *State v. Valdez-Molina*, 127 Idaho 102, 106 (1995).

C. The District Court Erred When It Denied Mr. Gwin's Motion To Suppress

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; Idaho Const. Art. I, § 17. The purpose of these constitutional rights is to "impose a standard of reasonableness upon the exercise of discretion by

governmental agents and thereby safeguard an individual's privacy and security against arbitrary invasions." *State v. Maddox*, 137 Idaho 821, 824 (Ct. App. 2002) (citing *Delaware v. Prouse*, 440 U.S. 648, 653-654 (1979)). The United States Supreme Court has held that when evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure. *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (citing *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914)).

Mindful that officers had either reasonable suspicion to conduct an investigative detention Mr. Gwin asserts that the officer that seized him did not have reasonable suspicion to conduct a traffic stop.

1. The Officer Lacked Reasonable Suspicion To Detain Mr. Gwin

The Fourth Amendment safeguard against unreasonable searches and seizures applies to the seizures of persons through detentions falling short of arrest or an arrest. *United States v. Brignoni-Ponce,* 422 U.S. 873, 878 (1975); *Terry v. Ohio,* 392 U.S. 1, 16 (1968). The stop of a vehicle constitutes a seizure of its occupants and is, therefore, subject to the Fourth Amendment restraints. *State v. Flowers*, 131 Idaho 205, 208 (Ct. App. 1998). A vehicle stop is of limited magnitude compared to other types of seizures; however, it is nonetheless a "constitutionally cognizable" intrusion and therefore may not be conducted "at the unbridled discretion of law enforcement officials." *Prouse*, 440 U.S. at 661.

When the purpose of the detention is to investigate a possible traffic offense or other crime, it must be based upon reasonable, aritculable suspicion of criminal activity. *State v. Schumacher,* 136 Idaho 509 (Ct. App. 2001); *Florida v. Royer,* 460 U.S. 491,

498 (1983). Although the required information leading to formation of reasonable suspicion in the mind of the police officer is less than the information required to form probable cause, it still "must be more than mere speculation or a hunch on the part of the police officer." *State v. Cerino*, 141 Idaho 736, 738 (Ct. App. 2005). The reasonableness of the officer's suspicion is evaluated based upon the totality of the circumstances at the time of the seizure. *Flowers*, 131 Idaho at 208.

In the case at hand, officers had received information from a caller that there was a fight in the street. (Tr., p.6, L.1 – p.8, L.8.) When Deputy McRoberts arrived at the location he saw a person, later identified as David Gwin, walking in the middle of the street. (Tr., p.8, L.9 – p.9, L.14.) David Gwin told the officer that he had been in an argument with his father Roy, that he did not want to press any charges, and that his father was driving a green Blazer. (Tr., p.9, L.19 – p.13, L.10.) David did not appear to have any injuries, but did have a ripped shirt. (Tr., p.11, Ls.1-25.) Deputy McRoberts then radioed Deputy Summers and told him that they were looking for a green Blazer. (Tr., p.14, Ls.4-19.) After receiving a radio call from Deputy McRoberts, Deputy Summers located a green Blazer and conducted a traffic stop. (Tr., p.21, L.11 – p.24, L.13.) It was during this stop that officers discovered that Mr. Gwin had consumed alcoholic beverages prior to driving.

Mr. Gwin asserts that any possible reasonable suspicion was dispelled once officers contacted David Gwin, David told them he didn't want to press charges, and did not appear to have any injuries. There was no information that Roy Gwin was in need of assistance, wanted to pursue charges, or that a battery had even occurred. As such, the officers did not have reasonable suspicion to continue to investigate a possible crime and Mr. Gwin's Fourth Amendment rights were violated when officers detained

him. Because the State failed to provide evidence of reasonable articulable suspicion to detain Mr. Gwin, all evidence obtained as a result of the illegal seizure must be suppressed.

2. All Evidence Collected Against Mr. Gwin Following The Illegal Detention Must Be Suppressed As It Is Fruit Of The Illegal Governmental Activity

The application of the exclusionary rule to suppress evidence is appropriate only to evidence that is fruit of the illegal governmental activity. *Segura v. United States,* 468 U.S. 796, 815 (1984); *Wong Sun v. United States,* 371 U.S. 471 (1963); *State v. Bainbridge,* 117 Idaho 245, 249 (1990). The test is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun,* 371 U.S. at 488 (quoting MAGUIRE, EVIDENCE OF GUILT, p. 221 (1959)). Suppression is required only if "the evidence sought to be suppressed would not have come to light but for the government's unconstitutional conduct." *State v. Wigginton*, 142 Idaho 180, 184 (Ct. App. 2005) (quoting *Nava-Ramirez,* 210 F.3d at 1131).

In the case at hand, Mr. Gwin was illegally seized without reasonable suspicion. Had Mr. Gwin not been illegally seized, the officer would not have discovered that Mr. Gwin had consumed alcohol prior to driving. The State failed to meet its burden in showing that the evidence is untainted; therefore, all the evidence collected after the impermissible seizure must be suppressed as fruit of the illegal police activity.

II.

The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Twenty Years, With Three Years Fixed, Upon Mr. Gwin Following His Plea Of Guilty To Felony Driving Under The Influence And A Persistent Violator Enhancement

Mr. Gwin asserts that, given any view of the facts, his unified sentence of twenty years, with three years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Gwin does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Gwin must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992)). The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978)).

Mr. Gwin asserts that the district court failed to properly consider the mitigating factors that exist in his case. Specifically, he asserts that the district court failed to give proper consideration to his admitted substance abuse problem and desire for treatment.

Idaho courts have previously recognized that substance abuse and a desire for treatment should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89 (1982), *see also State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991).

Mr. Gwin has a long history of substance abuse. He began drinking alcohol at the age of thirteen, using marijuana at the age of thirteen, and using methamphetamine and cocaine at the age of twenty-one. (Presentence investigation Report (*hereinafter,* PSI), p.11.) Although Mr. Gwin has continued to struggle with occasional alcohol use, he has been able to stop using all illegal substances. (PSI, p.11.) Mr. Gwin was participating in AA and was a volunteer for the Idaho Meth Project. (PSI, p.8.)

In completing a substance abuse evaluation, Mr. Gwin stated that he is 100% ready to remain abstinent. (PSI Attachment, p.32.) It was recommended that he complete Level I Outpatient treatment. (PSI Attachment, p.34.) In the PSI, Mr. Gwin noted that, "I've really enjoyed the time I've had clean which prior to his has been just short of 4 years. This incident is a terrible mistake on my part and I will be seeking further treatment whatever the outcome. I must stay involved to remain health[y] and sober." (PSI, p.11.)

Furthermore, in *State v. Shideler*, 103 Idaho 593, 594 (1982), the Idaho Supreme Court noted that family and friend support were factors that should be considered in the Court's decision as to what is an appropriate sentence. *Id.* Mr. Gwin has the support of his mother. (PSI, p.8.) He noted that the two have a "dear" relationship. (PSI, p.8.) Ms. Reba Gwin noted that her son has always been helpful, that he very capable, and that he was, with the exception of the instant offense, doing a much better job of working and leading a productive life. (PSI Attachment, p.20.)

Ms. Arnold wrote that:

> I have known Roy Gwin over two years. During that time he has been following the guidelines of his parole. Not doing drugs or drinking, attending all his meeting and paying on his fines and debts.
>
> Roy is the hardest working person. He worked full time at the creamery and then before work and week-ends the helped me. I own a home maintenance business – cleaning, painting, repairs etc.
>
> Roy is very generous and will always go out of his way to help others. He is honest, dependable and strives always for high standards in whatever task is at hand.
>
> Both Roy and I are shocked, scared and dismayed over what happened in the canyon with his son. It was totally out of character for him, he has been so intent on being good.
>
> Roy has a lot of support and a good home, whenever he is released.

(PSI Attachment, p.22.) Karen and Arthur Lindemer, Diane Oden, and Jan Ketterling also wrote letters of support discussing what a great person and worker Mr. Gwin was. (PSI Attachment, pp.23-26.)

Additionally, Mr. Gwin has expressed his remorse for committing the instant offense. In *State v. Alberts*, 121 Idaho 204 (Ct. App. 1991), the Idaho Court of Appeals reduced the sentence imposed, "In light of Alberts' expression of remorse for his conduct, his recognition of his problem, his willingness to accept treatment and other positive attributes of his character." *Id.* 121 Idaho at 204. At the sentencing hearing, Mr. Gwin stated:

> Your Honor, I would just like to make this short. I'm not the same person I was 10 years ago. I'm not the same person I was 20 years ago. You know, 10 years ago I was homeless. I was a drug addict. I didn't care where my next meal came from. I didn't care where I laid my head.
>
> You know, today I take life very responsibly. I work very hard. You know, I do have a home to go to. I do have employment. I do have a strong support group.
>
> During my evaluation the gal asked me, you know, "On a percentage of my friends, how many use?["]
>
> "Zero." I don't have those people in my life anymore. I do have family that use, you know, and I don't know how to alienate myself from them, but I have eliminated those people from my life, you know, the users, the – you know, I don't have a use for those people in my life.

> I've got ten years clean from methamphetamines. I've go 20 years clean from cocaine. Other than this incident and the funeral in March, I've got four years clean of alcohol.
>
> Mr. – Tony, he brought up the fact that I've always been hit hard on sentences. I have. I've never been offered drug court. I've never been offered anything but time in prison, you know. In 21 years I've done a little over 17 years in prison inside the gates.
>
> You know the person I was 10 years ago, that's where I needed to be. I don't need to be there today, you know. Where an I going to go? You know, 10 years from now, you know, I'll be 60 years old.
>
> How am I going to live the rest of my life? How am I going to retire? You know, where am I going to be able to make it? You know, I've got to look at those things today. That's what I have to say, Your Honor. I [am] sorry. I am absolutely in total shame and I'm scared to death. Thank you.

(Tr., p.82, L.2 – p.83, L.16.)

Further, Mr. Gwin was employed at the time of his arrest. (PSI, p.10.) He had been working for Commercial Creamery for over a year. (PSI, p.10.) Commercial Creamery noted that Mr. Gwin was a "dependable employee who required little supervision, and is eligible for rehire." (PSI, p.10.) The Production Supervisor, noted that he would recommend Mr. Gwin as an employee to anyone who may have an opportunity to hire him. (PSI Attachment, p.21.) In the past, Mr. Gwin has worked for Allen Construction. (PSI, p.10.) Mr. Gwin noted that he is skilled in construction, concrete, mechanics, fire fighting, equipment operations, welding, cooking, roofing, sanitation, is motivated, and has a great work ethic. (PSI, p.10.)

Based upon the above mitigating factors, Mr. Gwin asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his substance abuse, desire for continued treatment, friend and family support, remorse, and employment opportunities, it would have crafted a sentence that focused on his further rehabilitation rather than incarceration.

CONCLUSION

Mr. Gwin respectfully requests that this Court vacate the district court's order of judgment and commitment and reverse the order which denied his motion to suppress. Alternatively, he respectfully requests that this Court reduce his sentence as it deems appropriate.

DATED this 20th day of September, 2011.

ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of September, 2011, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

ROY THOMPSON GWIN
INMATE #35633
SAWC
125 N 8TH W
ST ANTHONY ID 83445

JOHN K BUTLER
DISTRICT COURT JUDGE
E-MAILED BRIEF

ANTHONY M VALDEZ
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to the Attorney General's mailbox at the Supreme Court.

EVAN A. SMITH
Administrative Assistant

EAA/eas